THE LAW REPORTER.

VOL. I.] BOSTON, MARCH 10, 1838. [No. 1.

THE BENCH AND THE BAR.

CHANCELLOR KENT.

In selecting from eminent members of the American bar, a proper subject for a biographical notice, the character and writings of Mr Chancellor Kent claim the earliest attention.

JAMES KENT was born July 31, 1763, in the county of Putnam, and state of New York. At the age of five years he was placed at an English school in Norwalk. In May, 1773, he was sent to a Latin school in Danbury, Connecticut; and in September, 1777, he entered Yale College, where, in September, 1781, he was graduated with a good reputation, and soon after commenced his professional studies, under the direction of Egbert Benson, attorney general of the state of New York. In January, 1785, he was admitted an attorney, and in 1787, a counsellor of the Supreme Court. During his academical studies, he manifested a lively disposition, great quickness of parts, and a commendable spirit of emulation. His character was simple. His morals were pure. With a winning vivacity and playfulness of temper, he was uniformly cheerful, lively and communicative. He had a keen relish for the beauties of natural scenery. His favorite reading was history, poetry, geography, voyages and travels.

He started in life with little, but habits in all things temperate, which are better than money. In April, 1785, he married a lady a few years younger than himself, with whom he has continued to live in uninterrupted happiness. Possessing a temperament of great amenity, he has ever been, in social intercourse, a kind, indulgent and affectionate companion. In 1787, he renewed his classical studies with great ardor. Rising early, he studied Latin and Greek until ten o'clock, after which he applied himself to law until the hour of dinner. In the afternoon, he devoted two hours to French, and the rest of the day to English authors. He collected a valuable library, which, he has often been heard to say, has been to him, next to his family, the greatest source of enjoyment. A friend of Jay and Hamilton, he early joined the federal party, to whose principles he has uniformly adhered. In December, 1793, he was appointed professor of law in Columbia College. He has received the degree of doctor of laws from Columbia, Dartmouth and Harvard. February, 1796, he was appointed master in chancery. March, 1797, he was appointed Recorder of the city of New York. February, 1798, he was appointed junior judge of the Supreme Court. He began his judicial labors, by preparing a written argumentative opinion in every case of sufficient importance to become a precedent for the future. In 1800, he and Mr Justice Radcliffe were appointed by the legislature of New York to revise the statutes of the state. July, 1804, he was appointed chief justice of the Supreme Court, in which he continued to preside until 1814, when, upon the resignation of Mr Chancellor Lansing, he succeeded to the distinguished station of Chancellor of New York. His kindness and affability; his known habits of business and promptitude of decision, attracted many suitors and counsellors to the Court of Chancery. On the 31st of July, 1823, having attained the age of sixty years, the period limited by the constitution for the tenure of his office, he retired from the court, after hearing and deciding every case that had been brought before him. His decisions, distinguished alike for practical wisdom, deep research and accurate discrimination, are expressed in a simple and elegant diction.

In 1824, Mr Chancellor Kent was re-appointed professor of law in Columbia College, where he delivered a course of lectures, which have been published under the title of 'Commentaries on American Law.' The first volume of this work

appeared in November, 1826; the second in November, 1827; the third in 1828, and the fourth in 1830. In April, 1832, he published a second edition, carefully revised; and in 1836, a third edition, with additions and corrections.

The legal character of Mr Chancellor Kent has been so eloquently portrayed by one who is abundantly competent to judge of it, that we cannot do better than to adopt his language.

Mr Chancellor Kent has long been before the public in a judicial character, which he has sustained with increasing reputation, a reputation, as pure as it is bright; and he is, at the very moment we are writing, devoting himself to the labors of jurisprudence with a diligence and enthusiasm, which excite the admiration of the veteran counsellor at the bar, even more than of the ambitious student just struggling for distinction. He has always been remarkable for an unwearied attention to business, a prompt and steady vigilance, and a sacred reverence for juridicial authorities. For him the easy course of general reasoning, popular analogies, and fanciful theories, has no charms. He does not believe, that judicial discretion is the *arbitrium boni judicis*, much less *boni viri;* or, that he is at liberty to promulgate rules, either of law or equity, measured by his own abstract notions of what is fit or reasonable. He contents himself with administering the common law, as he finds it, without the rashness to presume himself wiser than the law, or the vanity of distinguishing himself by innovations. His life has been devoted, sedulously and earnestly, to professional studies. He has fathomed the depths and searched the recesses of the ancient law, the black-lettered relics of former times, so much disparaged, and yet of such inestimable value. He has traced back the magnificent streams of jurisprudence to their fountains, lying dark and obscure amidst the rubbish of monkish retreats, or stealing silently from the chivalric heights of feudal grandeur. His researches have been, amidst the dust and cobwebs of antiquated lore, pursued in the unfashionable pages of the Year Books, and Glanville, and Fleta, and Britton, and the almost classical Bracton. He has dared to examine the Abridgments of Brook, and Fitzherbert, and Statham; books, from which the modern student starts back with doubt and apprehension, as the great reservoirs, whence have been drawn the best principles of modern times, and whence must be drawn the body and soul of that learning, which distinguishes the professor from the sciolist. He has not stopped short at a survey of the mere Gothic structures of the law; but has examined with eager and enlightened curiosity the beautiful systems, with which the commercial law has been adorned in our day. He has mastered all their refinements, and has, in no small degree, contributed to their beauty and perfection. He has drawn deeply from the commercial law of foreign nations; the works of Straccha, and Roccus, and Valin, and Pothier, and Emerigon are familiar to his thoughts and his writings. He has there found the principles, by which our own jurisprudence is to be illustrated; and one is at a loss, which most to admire, the incomparable discernment of the judge, or the attractive excellence of the materials. If his attainments had found their boundary here, they would have entitled him to great praise; but he has nobly extended his inquiries beyond the common and commercial law, and explored the Roman jurisprudence through its texts and commentaries with uncommon acuteness and accuracy. This has been done with no idle view, to gratify a merely speculative curiosity, or to gather up the fragments of antiquarian fame. Like all his other studies, this has been made subservient to the great purposes of his life, the promotion of justice, and the establishment of a solid jurisprudence, founded in the most enlightened policy. In his decisions, we can every where trace the happy use of that marvellous system of doctrines, which Justinian collected with so much care, and which stands unrivalled in the world for its general equity and nice adaption to the necessities of mankind; a system, which was gradually matured by the labor of jurists and prætors, during centuries, in which Rome was the mistress of the world; and which had the singular advantage of being the combined results of experience, and general reasoning, and judicial interpretation, aided very little by imperial rescripts, and rarely marred by imperial interference. Let those, who now doubt the importance of the study of the

civil law by common lawyers, read diligently the opinions of Mr Chancellor Kent, and they will find all the objections, raised by indolence, and ignorance, and prejudice, practically refuted, and the civil law triumphantly sustained. They will perceive the vivid lights, which it casts on the paths of juridical science; and they will be instructed and cheered in the pursuit, though they may not hope to move in the brilliant career of such a judge with equal footsteps.

It required such a man, with such a mind, at once liberal, comprehensive, exact, and methodical; always reverencing authorities, and bound by decisions; true to the spirit, yet more true to the letter of the law; pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; — it required such a man, with such a mind, to unfold the doctines of chancery in our country, and to settle them upon immovable foundations. Without doubt, his learned predecessors had done much to systematize and amend the practice of the court. But it cannot be disguised, that the general state of the profession was not favorable to a very exact and well regulated practice. There were, comparatively speaking, few lawyers in the country, who had devoted themselves to courts of equity. In general, the ablest men found the courts of common law the most lucrative, as well as the most attractive, for the display of their talents. They contented themselves with occasional attendance at the chancery bar; and placed their solid fame in the popular forum, where the public felt a constant interest, and where the great business of the country was done. In many of the states no court of chancery existed. In others it was a mixed jurisdiction, exercised by courts of common law. And in those, where it was administered by a distinct judicature, there is great reason to fear, that the practice was very poor, and the principles of decision built upon a rational equity, resting very much in discretion, and hardly limited by any fixed rules. In short, the doctrines of the courts depended much less upon settled analogies of the system, than upon the character of the particular judge. If he possessed a large and liberal mind, he stretched them to a most unwarrantable extent; if a cautious and cold one, the system fainted and expired under his curatorship.

This description was applicable, perhaps, without any material exceptions, to the equity jurisprudence of our country; and New York comes in, probably, for a full share of it. At least, there are, in Johnson's Reports, abundant proofs, that neither the practice nor principles of the chancery of that state had, previously to the time of Mr Chancellor Kent, assumed a steady and well defined shape. We see, for instance, that points of practice are often most elaborately reasoned out by this learned chancellor, in various opinions, as if the case stood *de novo* before him, and he was called upon for the first time to apply the English practice to our own.

THE GRAND JURY.

It is often remarked, in favor of ameliorating the criminal code, that certainty of punishment is more beneficial than severity; but this truth is more appropriately, and should be more frequently, enforced in the grand jury room than in the halls of legislation. Criminals do not look at the laws as such, but to their administration. They learn to fear and respect them, when they are administered with certainty, energy, and without respect to persons. They do not count the many who are convicted, but the few who escape. They "lay the flattering unction to their souls," that the same technical objections, the same reasonable doubts, the same difficulties of proof may exist in their case, as in that of the wretch, who escapes merited punishment by an acquittal. Nor is the effect of frequent acquittals less deleterious to criminals themselves, than to society. There is no more dangerous man than he who, conscious of his guilt, learns from experience, the weakness of human tribunals, and is proclaimed to the world, negatively at least, an innocent man.

Viewed in this light, the duties of the grand jury are of the last importance; no labor of investigation should be spared by them, that no man may be arraigned, unless there be a reasonable certainty of his conviction, whatever may be their own opinion as to his guilt. Hearing as they

do, however, but one side, there are many cases where they present individuals whose innocence is afterwards manifest; but such cases only show the necessity of great deliberation in the exercise of their duties.

We have reason to believe that the grand juries, in this Commonwealth, are, in general, actuated by these principles. Of those in Suffolk, we can speak with some confidence. We are no eulogists of the whole course of the administration of criminal law in this city, but we are disposed to defend the Municipal court from harsh remarks,* which have been indulged against it, in view of the large number of convictions obtained in it, compared with the acquittals.† The truth is, the grand jury take particular pains to present no man on slight and frivolous circumstances. And the attorney for the Commonwealth, although he pursues the criminal, when in court, with untiring energy and with a vigilance that never sleeps, takes a very different course in the grand jury room. He never urges an indictment. He is the last man to be instrumental in bringing any one to the bar, unless he is fully satisfied of a reasonable certainty of conviction. But when such is the case, it is no part of his policy or official character to let the prisoner escape. With a mind that seizes upon the minutest points of a case, as well as the prominent; with acute reasoning powers, and a great knowledge of technical law, he enters into every case, however insignificant, with wonderful animation, and spares no effort to procure a conviction. After this, and it is worthy of all praise, Mr Parker does no more. The question of sentence, he leaves entirely with the court and the prisoner's counsel.

*A learned counsellor of the Suffolk bar, once exclaimed in the Municipal Court, that it was like the lion's den, in Æsop's fables, *the tracks were all one way.*

†The number of convictions in this court in 1837, was 113, acquittals, 45. The number of convictions at a late session of the Old Bailey, London, was 202, acquittals, 96; making about one acquittal for two convictions. Whether this latter estimate, which, it is said, may be relied upon as a fair exponent of the business in the Old Bailey, was made before the prisoners' counsel bill went into operation, is not known. This fact, would undoubtedly make much difference in the result, as many more acquittals now take place than before prisoners' counsel were allowed to address the jury.

These remarks are not merely of a local bearing; they are applicable to all parts of a country, whose citizens are protected by a grand jury. They are intended for all, who are liable to serve on that tribunal, and we shall be satisfied, if they convince any of the bad tendency, as well as injustice, of presenting any one without a full investigation. Still more, if they serve to explode the monstrous notion of presenting a man simply to punish him, where the evidence is not sufficient to convict.

There have been several decisions respecting the right of grand jurors to testify of proceedings before them. In Massachusetts there are statute regulations upon this subject.* A few years since, the question arose in Boston, whether the prosecuting attorney could refuse to testify of the proceedings in the grand jury room, under peculiar and interesting circumstances; which illustrate, at once, the truth of the preceding remarks, and the wisdom of the statute provision.

A young lady, of property, while on a visit to her friends in a neighboring State, received the addresses of a lawyer there, to whom she was finally married. The affair was attended with such circumstances, however, that her friends induced her to leave her husband, and she afterwards married a former lover. Great attempts were then made to have her indicted for bigamy. The case was examined by three successive grand juries, but they found no bill, probably believing the former marriage to be invalid, the lady being a minor at the time of the ceremony. A process, in equity, was then instituted, respecting her property, and a commission was sent here for evidence. The District Attorney was called upon to testify as to certain proceedings before the grand jury. He refused to do so, on the ground, that the reason of the law extended to him, as well as to any member of the grand jury. No coercive measures were resorted to, and the question was not, at that time, decided by a competent tribunal.†

*Revised Statutes, Chap. 136. Sect. 13.

†See Low's case, 4. Greenl. R. 439. Imlay v. Rogers. 2 Halst. 347. Commonwealth v. Tilden, 2 Stark. Ev. 2 Am. ed. 232. n. (1.) Roscoe's Criminal Evidence, 149.

AMERICAN CASES.

UNITED STATES CIRCUIT COURT.

BOSTON, JANUARY, 1838.

Hancox v. *Fishing Insurance Co.*

This was an action on a policy of Insurance, effected on certain articles on board the schooner Emily, which sailed from New York for the South Sea Islands, on a fishing voyage, and was lost on Refreshment Island. The policy was valued, and in case of loss, to be proof of interest, and liberty given to ship home skins in other vessels

There was evidence, that it was customary, in this trade, to take on board clothing, bedding and chests, of all kinds, for the use of the crew during the voyage, which are dealt out and sold to them during the voyage, by the master, and they are charged against the crew accordingly. These articles are called *slops*, and are put on board, sometimes by one of the owners, and sometimes by other persons; and upon all such sales, the master has a commission. The crew, in these voyages, receive a certain proportion of the proceeds of the oil and skins, in lieu of wages. There was also evidence, that their shares are liable for all advances—first to the owners—next to the master—and third to the shipper of *slops*.

In the present case, Hancox put on board the Emily certain articles, as above described, and effected an insurance with the defendants for $1,000 on "*slops and their proceeds.*" After goods to the amount of $950 had been sold, the vessel was lost. There were three other policies effected by the owners—one of whom was the plaintiff in this case—on the vessel and outfits, all of which have been paid; and the sums so paid, and the catchings sent home, supplied to discharge the advances of the owners to the seamen, and leave something to go for the slops, but not their full value.

And now the plaintiff, after an abandonment, claimed for a total loss.

Parsons & P. W. Chandler, for the defendants, insisted:—

1. That the policy was to continue only till the slops were sold. If it was to continue till they were sold, delivered, and *paid for*, it amounted to an insurance on seamen's wages, and was void.

2. That the plaintiff had no *insurable interest*, after the goods were sold. That, to recover on the policy, his interest must have continued till the loss happened. But at that time he had no control over the property, and no right of property in it. He had suffered no loss, as the crew were personally liable to him.

3. That the proceeds of the cargo had been paid for once, by the other policies, and the plaintiff must look to the amount there received for his remuneration.

4. That, so far as the slops were affected, there were no proceeds, other than the debts of the sailors. If the catchings were insufficient to pay the master and owners for advances, and if Hancox could recover, it must be because *there were no catchings*—and the policy was held by the Court to *guarantee* the catchings, as well as the *sailors' debts*.

5. That the plaintiff, as one of the owners, was fully insured by the other policies, and was fully paid, and if he now recovered, he would have, from the same office, a double payment of his loss.

C. G. & F. C. Loring for the plaintiff.

Story J. The real object of the policy was to cover the risks of the shipper, arising from the loss of the goods on the frustration of the voyage, by any of the perils insured against.

The reliance upon the seamen's personal responsibility was altogether a secondary consideration. As soon as the goods were sold to the sailors, the shipper acquired an interest in the success of the voyage, equal to the sales. It was something in the nature of an inchoate lien, and which became an actual lien upon the shares of the seamen in the proceeds of the adventure *pro tanto*, as fast as they were obtained.

The policy was not intended to cover the marine perils alone, but was also against the hazards of the voyage and adventure. It was analagous to an insurance on outfits in a whaling voyage. No one ever supposed that such a policy terminated *pro tanto* with every day's consumption of the outfits.

As to the plaintiff's interest, it seemed perfectly clear, that a person having a lien, or an interest in the nature of a lien, on property on board, had an insurable interest in it, and it could make no difference,

that he might have a right to pursue his debtor personally for the debt, on account of which the lien attached.

It has been said, that there were no proceeds here, on which a lien could attach. But the real question is, whether the interest, having once attached to the policy, was gone by subsequent sales, so that the plaintiff had ceased to have an insurable interest. I am not aware of any decision to the effect, that an interest ceases to be insurable, merely because it is subject to contingencies and has not, at the moment, anything tangible.

It was argued, that there must be an insurable interest at the time of the loss. I have always so understood the law. But in a recent case in the Common Pleas, in England, it was intimated, that if the assured had property in the goods at the time of effecting the policy, no change of interest afterwards, and before the loss happened, would affect the right of the insured. Whether so novel a doctrine will be adhered to, I cannot conjecture; but nothing in the present case proceeds on the admission of any such doctrine.

This policy was not, in any sense, an insurance of seamen's wages. They might be benefited by it, but it was effected by plaintiff for his owh security, not theirs.

On the whole, I think the plaintiff should recover—from the nature and terms of the policy operating on the usage of this particular trade. I consider, that the parties to the policy intended to cover the whole interest of the plaintiff, as a valued interest, and for the whole voyage, not only in the original clothing, but in the proceeds of that property, which are to be treated as in the nature of an outfit.

SUPREME JUDICIAL COURT.

BOSTON, MARCH TERM, 1837.

Whitwell et al. v. *Brigham.*

In August, 1835, the defendant drew certain bills of exchange on the plaintiffs, amounting to the sum of $30,000, payable in four months, which they accepted for his accommodation, on receiving from him a promissory note for $750. The bills were immediately negotiated; and on the 28th of December, the plaintiffs received notice from the holders, that they would be due on the 28th—31st of that month. The plaintiffs waited till December 30th, when they paid the bills, and on the 31st commenced this action—causing an attachment to be laid on defendant's property at six o'clock in the morning of that day.

The action was assumpsit. The writ contained the common money counts only; and the bills of exchange, with the $750 note, were offered in evidence to support them. This action was defended by one Burnside, a subsequent attaching creditor.

B. Sumner, for the defendant, insisted, that the declaration was insufficient, and that the action was brought too soon. These bills were not due till the 31st of December. The defendant had all that day to take care of them, and the plaintiffs paying them on the 30th, was in ther own wrong. They were not obliged to pay; they might have waited till the last day of grace, and then, if the defendant did not meet the bills, it was time for them to pay them. But here the plaintiffs had paid the bills before they were due, and had broken up defendant's business, without giving him an opportunity to take up the bills at their maturity.

C. P. & B. R. Curtis for the plaintiffs.

By the Court. There can be no doubt, that the declaration is good and sufficient. There are several grounds of defence to the action, but it is only necessary to consider the one most relied on, namely, that the action was brought too soon. It is indisputable, that the plaintiffs were liable to pay these bills at maturity. Now they had a right to pay them at any hour on the 31st of December, which was the last day of grace. They were not bound to pay till the latter part of the day, but they surely had a right to do it, even before business hours, if they chose, and the holders made no objection. But it is said, this money was paid on the 30th of December, before the bills were due, and the plaintiffs paid it in their own wrong; but the payment on that day may be considered as a deposit in the hands of the holders, to be applied to the bills the moment they were due. That moment was on the 31st of December, at any part of the day. The plaintiffs were liable as acceptors; they paid

the bills on the day they fell due, and it is difficult to see why they should not recover of the drawer, for whose accommodation they became acceptors.

Corey v. *Corey.*

Assumpsit for services rendered by the plaintiff, while a minor. It was in evidence, that the father of the plaintiff gave him liberty to live with the defendant, and have his earnings; but it did not appear, that this conversation was known to the defendant, or that any express contract was made by him with the plaintiff.

Fletcher for the defendant. A minor cannot maintain an action to recover for his services, unless he can show a general emancipation from his father's control, or a specific authority to contract on a particular occasion, neither of which appears in this case. The plaintiff's father may maintain an action for his wages, and if the plaintiff claims as assignee of his father's right, notice to the defendant of that assignment ought to be proved.

C. P. Curtis for the plaintiff.

By the Court. The relinquishment by the father, of the earnings of his son, is a sufficient emancipation. It is an authority to the son to let out his services, and to receive payment therefor. That this authority was not communicated to the defendant at the time, makes no difference. It is sufficient to prove it at any time afterwards.

In the absence of any evidence as to an authority conferred by the father, on the plaintiff, to labor for himself, the implied promise to pay, on the part of the employer, would result to the father. But this case is different. Here the son has an authority—a right, conferred upon him by the father, to receive his own earnings. The son acts for himself, and he has an authority to act for himself; therefore, in this case, the implied promise results to him, and he may maintain an action upon it.

Thomson v. *Winchester.*

This was an action on the case. The plaintiff, in his writ, alleged, that he had discovered valuable medicinal properties in various vegetable substances, and the best mode of applying the same to use, to which various substances he had given the name of "*Thomsonian Medicines.*"—That he had expended many years of laborious and accurate observation, in ascertaining the best mode of preparing said medicines; that it was his occupation to prepare and sell the same; that he used the best materials, and great care and skill in preparing the same, by which his medicines had acquired great reputation, and being much sought for, the plaintiff made profit from the sale thereof; and that the defendant, well knowing the premises, had prepared certain substances in the similitude of the medicines prepared by the plaintiff, and had sold them in large quantities, as and for medicines prepared by the plaintiff himself,—and that the medicines so sold were represented by the defendant as genuine "*Thomsonian Medicines;*" whereas the medicines, made by the defendant, were not the Thomsonian, but were made with other and bad materials, and were debased and adulterated:—by means of which the plaintiff's reputation in his business, and the reputation of his medicines were much injured, and he was prevented from selling large quantities of them, which he otherwise would have sold.

At the trial before *Morton, J.*, the plaintiff's counsel, *Sprague and Peabody*, contended, that Thomson, by his discoveries, had the sole and exclusive right to the preparation and sale of his medicines. They also offered evidence, tending to show, that the defendant had sold medicines of an inferior quality, as pure Thomsonian medicines,—and they contended, that this was an injury to the plaintiff's character, and to the reputation of his medicines, for which he might recover in this action, without proving that he had actually sustained any *real injury*, because the damages were implied.

Parsons & C. Sumner, for the defendant, insisted, that the plaintiff had no exclusive right to make and sell these medicines, as he had not taken out a patent, without which, there could be no exclusive right. They offered evidence to show, that he had made no discoveries; that the medicines sold by the defendant were of the same kind, and as good, as those sold by the plaintiff; and that "*Thomsonian medicines*" did not mean medicines prepared by Thom-

son himself, but medicines of *a certain class or kind.* They also contended, that the action could not be maintained without some proof, that the plaintiff had sustained some *actual injury*, from the doings of the defendant.

The whole Court, after an elaborate argument of the points of law, held :—

1. That Thomson had not, and could not have, any exclusive rights in relation to his medicines.

2. That the phrase "*Thomsonian medicines*" did not necessarily mean medicines prepared by Thomson himself, but might be a mere term of description.

3. That, if the defendant had sold medicines of an inferior quality to Thomson's own, representing them as made by Thomson himself, actual injury need not be proved, as the law implied it.

And as *Morton, J.*, had ruled this last point differently at the trial, the verdict, which was for the defendant, was set aside, and a new trial granted.

Hollingsworth v. *Dow.*

This was an action of Replevin to recover possession of a machine called a *Fourdrinier Paper Machine.* The defendant was a machinest, and claimed a right to hold possession of the machine, by virtue of his *lien*, for labor and materials by him bestowed and furnished, in the construction of it.

It appeared, that the plaintiff purchased this machine in an unfinished state, and a contract was made with one Nesbit to finish it, for which he was to receive about $1000, a part of which was to be paid when the machine was delivered finished, and the residue in six months afterwards, and the work was to be completed in ten weeks from the date of the contract.

In October, 1835, Nesbit made an agreement with Dow, the defendant, to take the machine and finish it, at the same time informing him of his (Nesbit's) agreement with Hollingsworth. Dow continued to work on the machine till July, 1836, when it was taken from him by the writ of Replevin.

The principal question before the court, was, whether Dow had a lien on the machine for what he had done.

H. H. Fuller, for the defendant, insisted,

1. That if Nesbit had done the work, he would have had a lien for $200, at least.—It could not be said that the contract was inconsistent with the notion of a lien, any further than concerned the $700, which the plaintiff was to pay six months after he had possession of the machine.

2. Dow acquired all the rights that Nesbit had. Nesbit's right might be transferred, and Dow's contract with him was not merely personal.

It was also said, that justice was on the side of the defendant. He had taken the work with the belief, that the machine—like other articles on which labor was performed—would be security in his hands for payment. But Nesbit had no property; and if the plaintiff recovered here, the defendant would have no remedy for his labor.

A. Cushing & *T. P. Chandler* for the plaintiff.

By the Court.—As between Nesbit and the plaintiff, the former would undoubtedly have had a lien for $200. But this right did not pass to the defendant. *His* contract with Nesbit was strictly personal, and to him he must look for compensation.

This was, substantially, the ruling of the Judge who presided at the trial, and judgment must be rendered on the verdict.

SUPREME COURT.

PHILADELPHIA, JANUARY, 1838.

Foster v. *Small.*

This was an action of slander. The declaration contained four counts, but the first only was relied upon, which recited, that the defendant said of the plaintiff, "*He," meaning Dr Foster, "is not a physician, but a two-penny bleeder.*" A verdict was rendered against the plaintiff, in the District Court, under the direction of *Stroud J.*, who tried the case. The plaintiff removed the case by writ of error to this court.

C. J. Jack for the plaintiff.

W. L. Hirst for the defendant.

Gibson, C. J. Though evidence of all the words alleged need not be given, it seems necessary that at least some of those that are actionable be proved as laid ; and while the proof of speaking is for the jury, the correspondence betwixt the words

spoken and the words laid, is for the court. The very words need not be proved, but where they are in fact proved, they must, it seems, correspond with the very words laid; and hence, perhaps, it is, that words spoken in the second person are not legal equivalents for words of the very same import spoken in the third. The only words before us of which there is a semblance of proof, are contained in the first count; "he is not a physician, but a two-penny bleeder." Now, though words which impute professional ignorance are certainly actionable, yet to say of a physician, that he is a two-penny bleeder, imputes not a want of professional skill, but want of professional dignity, manifested by a petty attention to the humbler employments of the art. They are, in fact, words of mere contempt. But the time has been when the business of the bleeder was not a distinct one, and when it was performed, as it still is in the country, by physicians of the first eminence. How far then, are the actionable words, "he is no physician," supported by the proof. The words sworn to by the first witness are, "If Doctor Foster is a two-penny physician, I am none; I am a regular graduate, and no quack." Now, granting for a moment, that proof of insinuation is equivalent to proof of assertion, and that a charge may be laid indifferently as insinuated or asserted, without regard to the proof, yet the charge insinuated here, was in fact not want of skill, but want of graduation; and though the imputation of being a quack, might sustain an action, it is not laid as a gravamen in the present. The words proved by the second witness are, "Doctor Foster is no regular bred physician; he has no diploma; he kills his patients, and bleeds them to death."

Here, too, it is proper to remark, the imputation of killing by blood-letting is not laid as a ground of action, and the material words are consequently those which allege irregular breeding and want of the usual collegiate certificate. Now were these admitted to be actionable, when accurately laid, proof of them would not support the present declaration; for there is no evident difference in respect to the malignity involved, as well as in the injury intended to be done by it, betwixt being irregularly bred and not being bred at all. But though it was held in Cowdey v. Highley, Cro. Cas. 270, that it is actionable to say of a physician, "he is no scholar," yet rules that are the growth of a country in which collegiate testimonials are the only passports to professional fame, are unsuitable to the habits of a people among whom professional instruction in colleges and universities was not originally attainable. Fifty years ago, medicine and surgery were in the hands of American practitioners who taught their pupils, as they had themselves been taught, without that collegiate training which now is happily accessible to all; and the want of a diploma is still not indispensable to medical reputation. But decisions in Croke's reports are unsafe precedents for the law of slander at the present day. The same witness, however, testified that the defendant said on another occasion, "*something like he did before*," as that he was "no doctor, that he behaved ungentlemanly, and took patients out of his hands." Were not this qualified by reference to something said before, the words "no doctor" would have furnished matter for the jury; but the reference to the former *colloquium* conclusively indicated that no more was meant than a repetition of the former charge. The proof, therefore, did not support the declaration.

Judgment affirmed.

ENGLISH CASES.

VICE-CHANCELLOR'S COURT.

LONDON, DECEMBER.

Luckey* v. *Robson.

THE object in this cause was to have an injunction continued, which had been granted two years since, to restrain the defendant from infringing a patent granted to Mr Samuel Jones, about seven years ago, for his invention of producing instantaneous light.

Mr *Knight Bruce*, in stating the case, said, that the letters patent were for the invention of a new and improved method of producing light by means of a small globule of glass, containing a certain quantity of sulphuric acid, hermetically sealed, which glass globule, being surrounded by a composition of one-third of oxymuriate of potash and the other two-thirds of some

fatty or vegetable matter, was applied to a taper of wood, paper, or other combustible substance, so that, when the glass was broken by a blow or pressure, the sulphuric acid, allowed to unite with the oxymuriate of potash, produced a light.

Mr *Jacob*, for the defendant, contended, that Mr Jones's invention was not new, and, therefore, could not properly be the subject of a patent; that it had always been known, that the combination of suphuric acid and oxymuriate of potash would produce a flame; that it had been used for a long time past in the common match boxes. It was further contended, that the words of the patent did not sufficiently explain the proportions of the materials, and that, since the whole of Mr Jones's invention was not new, a disclaimer ought to have been inserted of that part which was not original.

The *Vice Chancellor* said, that the invention for which Mr Jones had obtained the patent was, in fact, for having discovered such a mode of preserving sulphuric acid in a state of proximity to certain inflammable substances, as that it might be suddenly brought in contact with them at any moment it was required, or kept separate for any length of time; and it was in this his invention consisted. It was not in the use of sulphuric acid and oxymuriate of potasse, or the little globules, which might have been all known before; but it was the discovery of the whole combination, consisting of four known substances, described by regular steps in the specification, for which the plaintiff had obtained a patent, and now claimed the protection of the court. The evidence, he thought, sufficiently proved the novelty of the adaptation, and as the injunction had been suffered to go undisturbed for years, the court could not be doing wrong in upholding it.

COURT OF QUEEN'S BENCH.

English v. *Blundell and others.*

This was an action for money had and received, to which the defendants pleaded the general issue. It appeared that an association had been formed, called the Anglo-American Gold Mining Association, and that the plaintiff and defendants had become interested in a portion of the mines of that association. The plaintiff and defendants became purchasers of the lease of one piece of ground, and of the fee simple of the other, both situated in North Carolina, and alleged in the description of the particular of sale to be lands in which gold mines were situated, producing a certain amount of gold in proportion to a given quantity of ore. The two purchases were made at the prices of £2,000 and £3,000. The plaintiff gave four bills of £500 each, as payment of the first purchase, and for these bills discount was obtained by the defendants, who paid over the amount to the vendor. The agreement for the purchase was made under seal and it was stated there that "the above sum of £2,000 is to be held as a conditional payment, to be returned to the said purchasers, should the property upon inspection by an agent, to be sent out by the purchasers for that purpose, prove to have been misrepresented in the description of it in this agreement." One of the defendants went out and reported unfavorably of the purchase, and the plaintiff sent a note in his own name abandoning it. He subsequently brought this action against the defendants to recover back his purchase money. The defence was, that as this was an agreement under seal, the abandonment must be under seal also; that the plaintiff and defendants were partners in this transaction, and that one partner could not sue another under such circumstances as existed in the present case; and, lastly, that, if any action could have been maintained, it should have been in the form of covenant, and not in *assumpsit*.

Lord *Denham*, after hearing these objections argued, held that they were fatal, and directed a nonsuit.

Maquiac v. *Reynolds.*

This action was brought against the defendant as acceptor of two bills of exchange. The defendant pleaded infancy, and the surgeon who attended his mother was called to prove that his birth took place in 1816. The evidence was objected to on the ground, that the day book, by which alone the witness was enabled to speak, was not given in evidence, but Lord *Denham* was of opinion, that the evidence was competent without this, and a verdict was taken for the plaintiff by consent.

DIGEST OF LATE DECISIONS.

WENDELL'S REPORTS—VOL. XVI.

ASSUMPSIT.

1. Where a party, by a fraudulent representation of being the owner of land, induces another to bestow labor upon it in the expectation of enjoying the property as a joint owner, the latter party, on discovery of the fraud, may abandon the contract under which the labor was performed, and recover on the common count of indebitatus assumpsit, the value of the work done.—*Rickard* v. *Stanton.* 25

2. It is no objection, in such case, that the contract is for an interest in lands and is not in writing. *id.*

3. Where work done under a special contract is not completed within the time limited for its performance, but is progressed in after the day, with the assent of the party for whom the work is done, a recovery may be had under the common counts for the work done; but the plaintiff is confined to the rate of compensation fixed by the contract, whether one party or the other be the innocent cause of the delay, where there is no intimation during the progress of the work, of an intention to demand a different rate of compensation.—*Merrill* v. *The Ithaca and Owego Rail Road Co.* 586

4. But where the delay is caused by the wilful acts or omissions of the party for whom the work is done, originating in a premeditated design to embarrass and throw obstacles in the way of performance by the other party, who, notwithstanding, proceeds and bestows his time and labor in attempting the completion of the job, until in despair he finally abandons the work, the rule that the special contract must control, as to the right of compensation no longer prevails, and the party is entitled to recover under a quantum meruit. *id.*

5. Where a contract for the sale and delivery of personal property specifies the quantity, price and time of performance, the vendor is not entitled to recover under a quantum valebat for a portion less than the whole quantity agreed to be delivered, notwithstanding that the vendee has consented to a variation of the contract as to price, and time of performance.—*Mead* v. *Degolyer.* 632

BILLS OF EXCHANGE.

1. Where a party gives an acceptance for the accommodation of another, who passes it to his creditor to apply in payment of a note, and the creditor procures the acceptance to be discounted, and transmits its avails to the acceptor, with instructions to apply the same to the payment of the note, who, instead of doing so, applies the avails to a general account against the drawer, an action lies in favor of the creditor against the acceptor, for so much money had and received, notwithstanding that the acceptance was mere accommodation paper, and that the acceptor at maturity was obliged to, and actually did pay the acceptance.—*Patty* v. *Milne.* 557

2. In an action by a bona fide holder of a note, obtained before maturity by a transfer, the maker cannot set-off a demand he had against the payee at the time of the transfer, although the note was accepted by the holder in payment of a precedent debt, unless the note was originally made for the accommodation of the payee, or was satisfied whilst in his hands, and fraudulently put by him into circulation. Even then, the set-off is not allowable if the holder can prove that he received it in the usual course of trade, paid value, parted with property or gave credit on the faith of the paper at the time of transfer.—*Smith* v. *Van Loan.* 659

CASE.

1. The encroachment, by one party, upon a way held in common, by building part of the wall of a house upon a portion of it, and enclosing another portion within fence, work an extinguishment by operation of law; especially where the other party sells his interest after such acts done, and the purchaser on his part, acquiesces in and confirms what has been done.—*Corning* v. *Gould.* 531

2. The acts relied on to show an extinguishment must be such as clearly to indicate an intention to abandon the right to the easement or servitude. *id.*

3. Where the party relinquishes the enjoyment of an easement or servitude, it lays with him to show an intention to resume the use of it within a reasonable time; and where there are no circumstances intimating the suspension to be temporary only, a bona

fide purchaser will be protected in the enjoyment of the property, as it appeared at the time of his purchase. *id.*

4. An uninterrupted adverse user of 20 years, in analogy to the statute limiting a right of entry, confers a complete prescriptive title to a way or other easement or servitude; and the extent of the way is governed by the user. *id.*

5. Where the case is questionable, the usual course is to leave it to the jury to say whether they will presume a grant; but where the fact of adverse possession is beyond dispute, the law itself raises the presumption. *id.*

CHANCERY.

1. It is no bar to a bill in equity, that the complainant might have sought his remedy by action at law for money had and received, in a case where a party received money as the trustee of another; in such a case, courts of law and equity have concurrent jurisdiction.—*M'Crea* v. *Purmort.* 460

EVIDENCE.

1. The consideration clause in a deed, that is, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer, is open to explanation by parol proof. Thus, where the consideration in a deed conveying lands was expressed to be money paid, it was held, that parol evidence was admissible to show that the consideration, instead of money, was iron of a specified quantity, valued at a stipulated price. *id.*

2. It seems, according to the American cases, that the only effect of a consideration clause in a deed, is to stop the grantor from alleging that the deed was executed without consideration; and that for every other purpose it is open to explanation, and may be varied by parol proof. *id.*

3. Where a deed is ambiguous, as where it gives both length of chain and a public highway as the termini of a line, parol evidence of the actual survey and location of the highway is admissible, without producing the record of the laying out and survey. *Rich* v. *Rich.* 663

FRAUDS.

1. In a sale of property at auction, the auctioneer is the agent of both parties, and the entry made by him of the name of a purchaser, and of the sum bid, is a sufficient signing or subscription of the memorandum, within the meaning of the statute of frauds, to charge the purchaser.—*Trustees of the First Baptist Church of Ithaca*, v. *Bigelow.* 28

2. Such memorandum, to be valid, must contain every thing necessary to show the contract between the parties, so that there be no need of parol proof to explain the intention of the parties, or the terms of the agreement; and it was accordingly held in this case, where a pew in a church was sold at auction to the defendant, and the only memorandum of the sale was an entry made by the auctioneer on a chart or plan of the ground floor of the church, exhibited at the auction, of the name of the purchaser, and of the sum bid by him, that the memorandum was not sufficient within the requirements of the statute; although, at the time of the auction, a written or printed advertisement, containing the conditions of sale, was exhibited and read to the purchasers. *id.*

3. The interest of a party in a pew in a church, although a limited and qualified interest, is an interest in real estate, and a contract for a pew for a period extending beyond one year is void, unless reduced to writing. *id.*

4. In a contract for the purchase and sale of lands, the statute of frauds is satisfied if the party to be charged therewith sign the contract; it is not necessary to the validity of the contract, that it should be signed by both parties.—*M'Crea* v. *Purmort.* 460

INSURANCE.

1 A party in possession of a dwelling-house, under a valid subsisting contract of purchase, although he has not paid the whole consideration of money, has an insurable interest; and if he apply for insurance, representing the house as his, and it is described in the policy as his dwelling-house, he is not guilty of a misrepresentation or breach of warranty so as to avoid the policy. — *The Ætna Fire Insurance Co.* v. *Tyler.* 385

LEGISLATION.

MAINE.

A JOINT select committee, to whom was referred an order, directing them to inquire into the expediency of amending the statutes for the support and regulation of mills, have made a report, in which they recommend the repeal or modification of the statute altering the common law as to flowing, which has been in operation, if we mistake not, ever since the separation of Maine from Massachusetts. The committee say, that the first statute on the subject was passed in Massachusetts in 1713. "The evil then was, that some persons, owning small lots of meadow land, stood in the way of erecting mills, which, in the then weakness of the country, was a great effort, and a commendable public enterprise. The evil is now, that men in the lumbering business, flow and render unproductive, thousands of acres of good land, not their own."

The principle adopted in Massachusetts, was received in Maine. "It has also extended to Rhode Island, and has been adopted there, to increase water power for manufacturing purposes. In all the other northern and middle States, extending as far south as to include Maryland, Ohio and Indiana, and also in South Carolina and Georgia, flowing remains at common law. In other southern States, flowing is permitted by statutes; but proceedings to authorize it precede the right to flow. After hearing all parties interested, in proper cases, there, the Courts permit flowing, setting forth in their decree the terms and limitations."

The committee are of opinion, that the statute is not only unconstitutional, but oppressive and inexpedient. "Allowing the mill owner, as he pleases, to take into possession the land of another for his mill pond, throws the injured party into the false position of appearing to be a party disturbing the rights of others. This is one cause for the general failure of justice under the statute, on which have been many prosecutions, although many suffer who never prosecute. To purchase all the lands proper to be flowed, would be, generally, far less expensive, than the present State system of permitting the lands to be flowed first, leaving to the owners only remedy by petition. After a tedious controversy to settle the damages, it commonly happens, that both parties are dissatisfied. This has a tendency to bring disrespect upon our system of administering justice.

"Time has wrought such changes, that now, to promote Agriculture, is more a public benefit, than to encourage the increase of mills. As in so many States, embracing much more than half the Union, no statutes as to flowing have been adopted, it would seem safe to return to the common law here, relying on time to point out proper remedies for any evils that may arise. Such has been the oppressive practice under the flowing provisions, and such difficulties have been experienced in the attempts to obtain justice under them, that in the cases that now exist, it is fair to presume, that the injured land owners would submit to any reasonable terms that the mill owners may offer."

MASSACHUSETTS.

DOUBTS have been entertained, in this commonwealth, whether a person duly summoned to attend as a witness before the Supreme Judicial Court, or Court of Common Pleas, was bound to obey such summons, if his place of abode was more than thirty miles from the place of trial. An order was introduced into the House of Representatives and referred to the Judiciary Committee, to inquire whether any legislation on this subject was necessary.

The committee have presented a report to the House, in which they express their conclusion, that legislation is inexpedient. They are of opinion, that, as the law now stands, although a party *may* take the deposition of a person who resides more than thirty miles from the place of trial, this course is altogether optional; and that he may, if he choose, compel the attendance of the witness.

"Your committee do not think, that the law is subject to the reproach, that merely because a citizen resides *one and thirty* miles from the place of trial, he cannot be compelled to appear and testify in Court, though possessed of knowledge indispensable to the just determination of the cause. Your committee are of opinion, that the power to summon witnesses before the Superior Courts, is limited only by the boundary of the Commonwealth, and con-

sequently, that no farther legislation is necessary on this subject.

CRITICAL NOTICES.

Fifth Annual Report of the Trustees of the State Lunatic Hospital, at Worcester, December, 1837. Boston, Dutton & Wentworth, *State Printers*, 1838.

This institution has been in operation nearly five years. Thus far, it has been eminently successful in accomplishing its main objects, to wit, — the cure of insanity, and the safe keeping, and amelioration of the wretched condition of those whose intellects are irrecoverably ruined. With many facts of deep interest to the community, the report contains a theory of insanity, which, as applied to the administration of criminal law, deserves the severest reprobation. It maintains that insanity is a physical disease; that the operation of the feelings, passions, and understanding depends upon the physical system; that the physical system is subject to diseases, which produce those physical phenomena, *beyond the ken of human scrutiny*, that originate insanity; and, *therefore*, that the question of insanity should arise in every case of criminal prosecution, and be satisfactorily settled before the jury render a verdict. (R. pp. 54, 68, 69.) This means, if any thing, that a criminal act is stronger presumptive evidence of insanity, than of guilt. The tendency of such a doctrine is to destroy the feelings of responsibility in those persons who most need its restraint. Nothing can be more fatal to social confidence and order, than the doctrine that men, not only may, but often do, lose all responsible self-control, while they retain a murderous power, of action: and we sincerely hope that no jury will ever be found, who shall require the prosecuting officer to lay his finger on the origin of thought in the criminal's head, and on his corporal oath declare that the same is "all right," before they will render into court a verdict of "guilty." Men, especially those wise in their own conceit to give a reason, have ever been astute at throwing the blame of their own sins, either upon the devil or their Maker, but this inclination has always proved to be subversive of government, whether of God, or man.

Theories cannot alter facts. Doubtless one may excite the taste, smell, learning, sight, touch, or sexual sensation, until the finger of God write upon the forehead "demented;" or indulge in corroding thoughts and fiery passions until the body is reduced to a mere chemical residuum, and still insanity may not be strictly either a physical or a moral disease. It is enough, that it is a human disease, in which,—as few would be considered as of a sound mind, were men judged only by their consecutive thoughts,—impropriety of self-expression, chiefly characterizes its victims; even the report states, that the very paroxysms of insanity are rarely beyond the power of moral control; and it contains abundant proof, that moral treatment has been attended with the most successful, curative effect.

"When the intellect is overwhelmed with wild dreams and terrific visions, the heart often retains its susceptibility to kind impressions, through which the intellect can be frequently reached and reclaimed."

"Society revives self-respect and the habit of observing the social decencies." "Employment is one of the most useful means of cure resorted to in this institution." "Amusements are encouraged as another means of cure." "Religious worship has been introduced as one of the moral means of cure, and numbers have attended, who, in the halls are noisy, talkative, profane, and have conducted with the greatest decorum."

MISCELLANY.

CRIMES IN BOSTON.

The number of persons indicted in the Municipal Court, in 1837, was 270. There were 5 appeals from the Police Court. There were 16 informations filed by the County Attorney. The persons who pleaded guilty were 64. The persons who pleaded not guilty were 184. The verdicts returned by trial juries, were 113 guilty, and 45 not guilty. The number sentenced to the State Prison was 42; to the House of Correction, 73; to the House of Reformation, 11: those fined were 44. The amount of fines was $1526. Persons who forfeited their recognizances were

19. The Court was in session 124 days.—The grand jury were in session 30 days, and examined 315 cases. The trial juries were in session 70 days.

From a report of a late grand jury in this court, it appears, that there has been a great increase of business the last three months. During that period, the grand jury have been in session nineteen days; have examined four hundred and ten witnesses, and have filed in court one hundred and twentynine indictments. They express the opinion, however, that the increase "has rather been from accidental circumstances than from permanent causes." In concluding their report, they suggest several alterations in the statute laws of the commonwealth. "The bank law is very defective. More penalties and restrictions are necessary to secure fidelity and fair dealing, and more checks and preventives to restrain misconduct and fraudulent transactions. Also the law relative to arrests for debt on *mesne* process should be so amended, as, in case of manifest oppression and unreasonable and malicious perversion of its humane principles, an indictment for perjury, or for false imprisonment, might be authorized. The form of the oath now used in practice to justify arrests, is so worded, as to be very difficult, if not wholly incapable, of disproof; and the grand jury have reason to think there have been some abuses in this particular, beyond the reach of a criminal prosecution, as the law now stands. They hope the wisdom of the Legislature will, in its present session, be directed to these subjects."

UNIVERSITY OF THE CITY OF NEW YORK.

We learn, from New York papers, that arrangements are making for the organization of the departments of law and medicine, in this institution, in a manner honorable to the university, and offering great inducements to students, in these professions, to avaithemsel ves of their advantages. The faculty of law will be organized, and ready to commence instruction, about the beginning of April; at which time the Hon. Benjamin F. Butler is expected to enter upon the duties of his appointment, as professor of the Law of Nations, Constitutional Law, the Law of Real Property, and of Equity. The professorship of Pleading and Practice will be filled, it is said, by David Graham, Esq., a gentleman known to the profession as the author of a treatise on the practice of the Supreme Court, and that of Commercial Law and Personal Property, by William Kent, Esq., son of Mr Chancellor Kent.

NEW YORK REPORTS.

We learn, that Cowen and Wendell's Reports are about to be condensed into eight volumes—and the price reduced from $150 to $48. The work has been for some time in a course of preparation, by Hiram P. Hasting, Counsellor at Law, and will be put to press as soon as practicable. The plan is similar to that of Peters's Condensed Reports of the Supreme Court of the United States. The work is to be a faithful report, and not a *mere abridgment* of Cowen and Wendell, containing the whole series of cases argued and determined in the Supreme Court, and Court for the Correction of Errors of the State of New York, from May term, 1823, to May term, 1837.

ANECDOTE.

One of the members of the Massachusetts bench, a short time since, when making the western circuit, often met an eminent counsellor from Boston. On opening the court in this city, the same gentleman appeared as counsel in the first action which was called.—"Ah well, Mr P—," said his honor, "so we go, round and round, like a horse in a cider mill." "Yes, your honor," was the reply, "*and care about as much what we grind.*"

THE RECORDER OF LONDON.

The Hon. Mr Law has now filled the situation of Recorder for the city of London for about four years. He is son of the late, and brother of the present, Lord Ellenborough. He is well versed in the criminal jurisprudence of the country; and the soundness of his judgment is admitted by all. But these are not the qualities in the judicial character of Mr Law, on which I would chiefly delight to dwell. The qualities to which I allude are chiefly of a moral kind. It has been my fortune to see a great many judges in Scotland as well as

in England, presiding in courts of justice; but I have never seen one who seemed to me to be more deeply or more permanently impressed with a sense of the serious responsibility of his situation, than the present Recorder of London. He unites in a rare degree the gravity of the judge with the mildness and manners of a gentleman. He is ever anxious to anticipate the wishes of the unfortunate parties at the bar; and to afford them every opportunity of doing everything which the law allows, to procure their acquittal. He listens most patiently to everything they have to say, at whatever sacrifice of his own time, and however great the amount of personal labor to himself. He does this even when his most decided impression is, that there is not the slightest chance of an acquittal. A more humane judge never sat in a court of justice: you see kindness in his looks; humanity shows itself in every word he utters. His leanings, wherever the case can admit of leaning, are always on mercy's side; and nothing could be more affecting than the way in which he passes sentence in all those cases in which the magnitude of the offence or the serious criminality of the prisoner, has rendered it necessary, that an example should be made to deter others from pursuing the same course of conduct. It is plain in all such cases, that he is doing violence to his own feelings, in order, that he may faithfully discharge his duty to his country. I have reason to believe, that his admonitions to prisoners, in passing sentence, have more frequently been attended with beneficial effects to the unhappy individuals themselves, as well as to the spectators, than those of any other judge who has sat in any of our criminal courts, for a long series of years.—*Great Metropolis.*

OBITUARY NOTICES.

In London, January 13, in the 87th year of his age, died John, Earl of Eldon, upwards of twentyfive years Lord High Chancellor of England.

In Augusta, Maine, Lucius Barnard, Esq., Counsellor at Law, of Alna, and a member of the Maine Senate.

In Camden, Maine, Warren Rawson, Esq., Counsellor at Law.

In New York, on the 15th ult. Charles Graham, Esq., aged 57,—an eminent member of the legal profession, distinguished for professional talents, and not less for his amiable manners. Mr G. was Secretary of the Society of the Cincinnati.

In Washington, D. C. on the 24th ult. Hon. Jonathan Cilley, Counsellor at Law, of Thomaston, Maine, and member of Congress from Lincoln county, aged 35.

Mr Cilley was a native of New Hampshire, and belonged to one of the most ancient and respectable families of that State. He was graduated, in 1825, at Bowdoin College. He is recollected, while at that institution, as of a frank, amiable, and energetic character, and was distinguished as a great advocate of phrenology, a science then but little known. By superior ability and application, he soon attained a high standing at the bar in Lincoln county; and in 1832, he was elected to the House of Representatives in Maine.

In 1835 and 1836, he was speaker of that body. Mr Cilley was a good lawyer, an able advocate and a powerful debater. To the nomination of the late chief magistrate of Maine he was decidedly opposed, and in the convention he made a powerful speech in favor of Judge Smith. Afterwards, however, he was among the firmest supporters of Gov. Dunlap. While in the House of Representatives in Maine, Mr Cilley took a firm and decided stand in favor of the amelioration of the criminal code, and of the abolition of capital punishments. His speech on that subject will be long remembered. In 1837 he was elected to Congress.

Mr Cilley's death was most melancholy. He was shot in a duel by Mr Graves, of Kentucky. The weapons used were rifles, and he fell at the fourth fire. He is said to have arranged his affairs previously. He wrote to his wife and other friends in Maine, and made a request of a lady in Washington to visit his family in case of his fall.

Mr Cilley was followed to the grave by both houses of Congress, and his funeral was attended with great pomp. The justices of the Supreme Court, refused to attend, it is said, because the deceased fell in a personal rencontre.